authority could it be declared as an unvarying rule that an appearance, in the absence of due legal service of the subpoena, is conclusive evidence of collusion.

In Delaware, the case of *Wood* v. *Wood* (1909) 74 Atl. 376, is directly in point as supporting the decision of the principal case. The prior divorce act in Delaware provided that a summons shall issue for the defendant's appearance, *and upon such appearance,* or upon proof of the service of summons, or upon proof of substituted service, the cause shall proceed to trial. The laws of 1907 provide that a summons shall issue for the defendant's appearance, and upon proof of the service of summons or of substituted service the cause shall proceed to trial. The clause in the former act, "and upon such appearance," was omitted. The court held that it was perfectly clear that under the old act there were two means of obtaining jurisdiction, one, by appearance, the other, by proof of service, while the new act prescribed only one method, to-wit, by service, and said: "We think this new act contemplates an adverse proceeding, and the proceedings throughout must be free from taint or color of collusion. * * * The defendant voluntarily comes into court (she appeared by attorney) and attempts to assist by appearance in having the charge that she has violated her marriage vow determined against her as speedily as possible, all of which we think is against the clear intent of the act, and especially against public policy." The court believed the omission of the clause, *supra,* was a sufficient indication of the legislative intent that voluntary appearances should not be allowed in divorce proceedings.

And in the principal case we find that the court rested its decision very largely upon the ground that the legislature must have intended the new divorce act to be mandatory and expressive of a public policy to be strictly enforced. The court held that inasmuch as the act of 1907 prescribed the same procedure in divorce actions as in other cases in chancery *except so far as other process and procedure was prescribed by or under the authority of this act,* and then proceeded to prescribe a method of obtaining jurisdiction, it was clear that a voluntary appearance, as under the old act according to the rules of chancery, was no longer permissible.

The decision of the principal case can hardly be said to be judicial legislation, but it is certainly indicative of the present tendency of the courts and legislatures to tighten up on our divorce laws in response to the continual outcry against them. The mere fact, however, that the pendulum has already swung so far in one direction ought not to be a ground for swinging it too far in the other. L. F. M.

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THE QUESTION OF THE VALIDITY OF A STIPULATION FOR ATTORNEY'S FEES UNDER THE NEGOTIABLE INSTRUMENTS LAW.—Does the provision of the Negotiable Instruments Law, that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid: * * * (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity," give validity to such a stipulation? The question is answered in the negative by a recent case, *Miller* v. *Kyle* (Ohio 1911), 97 N. E. 372.

No other case that has directly passed on the same question has been

found. In view of this decision it must be acknowledged that the statement made on page 323, 10 MICH. L. REV., that "the Negotiable Instruments Law, now adopted by many of the States in this country, makes such a stipulation valid and enforceable," requires modification. But it does not appear that the decision of *Miller* v. *Kyle* is in accord with the spirit of the Negotiable Instruments Law nor founded on good reason. The purpose of the Negotiable Instruments Law is to secure uniformity of the rules of law on the subject as is clearly shown by the title, "An act to establish a law uniform with the laws of other states on negotiable instruments." It is but reasonable to infer that the views adopted by the legislature are those supported by the weight of authority. For a classification of the different conflicting decisions on the effect of a stipulation for attorney's fees in a promissory note see 10 MICH. L. REV. 323. The weight of authority sustains both the validity of the stipulation and the negotiability of the instrument. *Second Nat. Bank* v. *Auglin,* 6 Wash. 403, 33 Pac. 1056; *Salisbury* v. *Stewart,* 15 Utah 308, 49 Pac. 777, 62 Am. St. Rep. 934; *Bank of Commerce* v. *Fuqua,* 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461; *Ramsey* v. *Thomas,* 14 Tex. Civ. App. 431, 38 S. W. 259; *Farmers' Nat. Bank* v. *Rasmussen,* 1 Dak. 60; *Wilson Sewing-Mach. Co.* v. *Moreno,* 7 Fed. 806; *Oppenheimer* v. *Farmers etc. Bank,* 97 Tenn. 19, 36 S. W. 705; *Farmers' Nat. Bank* v. *Sutton Mfg. Co.,* 6 U. S. App. 312; 52 Fed. 191; *Dorsey* v. *Wolff,* 142 Ill. 589; *Tyler* v. *Walker,* 101 Tenn. 306, 47 S. W. 424; *Benn* v. *Kutzschan,* 24 Ore. 28, 32 Pac. 763; *Shenandoah Nat. Bank* v. *Marsh,* 89 Iowa 273, 56 N. W. 458; *First Nat. Bank* v. *Slaughter,* 98 Ala. 602, 14 South. 545; *Stark* v. *Olsen,* 44 Neb. 646, 63 N. W. 37; *Clifton* v. *Bank of Aberdeen,* 75 Miss. 929, 23 South. 394; *Exchange Bank* v. *Tuttle,* 5 N. M. 427, 7 L. R. A. 445; *Smith* v. *Muncie Nat. Bank,* 29 Ind. 159; *Smith* v. *Silvers,* 32 Ind. 321; *Wood* v. *Winship Mach. Co.,* 83 Ala. 424, 3 South. 757, 3 Am. St. Rep. 754; *Campbell* v. *Worman,* 58 Minn. 561, 60 N. W. 668; *Miner* v. *Paris Exch. Bank,* 53 Tex. 559; *Bowie* v. *Hall,* 69 Md. 433, 16 Atl. 64, 9 Am. St. Rep. 433, 1 L. R. A. 546. The fact that the legislature made provision for stipulation for attorney's fees shows that it legalized the existence of such a stipulation on a note. If it had been the intent of the legislature to consider it void, it would have declared so, or omitted to mention it altogether. If the stipulation was void, it would be mere surplusage, and could not in any way effect the certainty of the amount to be paid, and so it would not only be superfluous but absurd for the legislature to define what should constitute certainty by saying that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid with costs of collection or an attorney's fee in case payment shall not be made at maturity." It is true that the statute does not in express terms declare that a stipulation for attorney's fee shall be valid, but its language and spirit clearly recognize its validity. The decision of *Miller* v. *Kyle* is certainly a manifestation of the tendency of the courts to adhere to what is ancient without paying due regard to the change of conditions, and to use every effort to evade statutory provisions that are enacted to remedy existing evils. A. Z. S.